

**DEPARTMENT TWENTY-THREE – JUDGE DONALD R. FRETZ
TENTATIVE RULING FOR HEARING SCHEDULED
THURSDAY, OCTOBER 23, 2008**

**DYE v. COUNTY of SOLANO, ET AL.
Case No. FCS030910**

Demurrer, Motion to Strike, Motion to Dismiss

TENTATIVE RULING

Defendants' motions to strike the first amended complaint and dismiss the action are denied.

It is evident that the language referring to the complaint as a petition for a writ of mandate is a vestigial remnant inadvertently left in the amended pleading. "The nature of an action and the issues involved are to be determined, not from the appellation given the pleading, but from the facts alleged and the relief that they support." (*Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 149.) The defect does not affect the substantial rights of Defendants and may be ignored. (Code Civ. Proc. § 475.)

Defendants' demurrer to the first amended complaint is overruled.

Construed liberally, the facts alleged in the first amended complaint establish the existence of a written instrument and an actual, present controversy. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606.) An action for declaratory relief is available for a determination by a court as to the enforceability of a contract or a portion thereof. (See, e.g., *IMO Dev. Corp. v. Dow Corning Corp.* (1982) 135 Cal.App.3d 451, 458-459.) Plaintiff alleges sufficient facts to suggest that the Last Chance Agreement is unenforceable as unconscionable and that there presently exists an actual controversy concerning whether Plaintiff was properly terminated under the terms of that agreement.

Likewise, nothing on the face of the challenged pleading suggests that Plaintiff has not stated a cause of action for breach of contract. (Code Civ. Proc. § 430.30; *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1008-1009.) Plaintiff has alleged the existence of an agreement, Plaintiff's performance, 3) Defendants' breach, and 4) damages. (*Poseidon Dev., Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1112.) In addition, in light of an express provision in the Last Chance Agreement permitting severance of any void or unenforceable provision, the existence of a contract provision for the waiver of Plaintiff's right to appeal or challenge termination of his employment under the terms of the agreement does not necessarily deprive Plaintiff of the ability to assert this cause of action.